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In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE UNITED STATES, APPELLANT,
v.
EVETT D. NIX. } No. 142.

EVETT D. NIX, APPELLANT,
v.
THE UNITED STATES. } No. 195.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

The items in dispute on these appeals are set forth in the record, and as we have admitted on the motion for the writ of *certiorari* the facts therein stated we will not discuss the question of jurisdiction of the cross-appeal.

APPEAL No. 142.

Item 2,—$69.18 (R., 3).

The court below erred in its conclusion of law and judgment in favor of the claimant for item 2 of the findings of fact (Rec., 4 and 5). The charge in that

item is for travel in going to serve warrants of arrests, 1,153 miles, at 6 cents per mile, $69.18, that travel being in excess of the distance from the place of arrest to the place of receiving writs. The fee bill for marshals, section 829, Revised Statutes (Rev. Stat., p. 157), provides the following fee:

> For travel, in going only, to serve any process, warrant, attachment, or other writ, including writs of subpœna in civil or criminal cases, six cents a mile, to be computed from the place where the process is returned to the place of service. * * *

This clause of the fee bill allows nothing for travel in excess of that distance, however necessary a greater distance of travel may be. The mileage is to be computed not for the distance which the marshal might find it necessary to travel in going to serve the process, but is "to be computed from the place where the process is returned to the place of service." In the old practice, the mileage fee for travel was generally for the same distance, whether it was computed from the place of arrest to the place of the return of the writ or whether it was computed from the place of receiving the writ to the place of service, because the writs were usually received by the marshal at the place where they were to be returned. But in the case at bar the prisoners were taken by the most direct routes from the places where the warrants of arrest were served to the nearest commissioners for examination. For that travel we necessarily assume, from the finding of the court below, that the marshal has been allowed

by the accounting officers the statutory fee for that distance, because the travel charged for in this item is said to be "in excess of the distance from the place of arrest to the place of receiving writs." The words quoted are in Finding III (R., 3), and they probably refer to the old practice where warrants were issued by commissioners of the circuit courts and made returnable to their own offices—a practice which has been changed by the statutes referred to under item 12, *post*. The change of practice may sometimes make the statutory mileage fee less than the expense of travel, but the last clause of section 829 R. S. provides that—

> In all cases where mileage is allowed to the marshal, he may elect to receive the same, or his actual traveling expenses, to be proved on his oath to the satisfaction of the court.

And he has another remedy in section 846, when he incurs "extraordinary expenses in executing the laws" of the United States.

THE CROSS APPEAL NO. 195.

Item 10,—$100 (R., 4).

This is a charge of $5 per day for twenty days for the attendance of the marshal at court by deputy. This item was disallowed by the court below. The fee bill (sec. 829, Rev. Stat.) allows the marshal for attending the circuit and district courts, when both or either are in session, $5 per diem during the term. The act of March 3, 1887 (24 Stats., 509, 541, c. 362;

Supp. R. S., vol. 1, 2d ed., p. 564), changed that clause of the fee bill as follows:

> Nor shall any part of any money appropriated be used in payment of a per diem compensation to any attorney, clerk, or marshal, for attendance in court, except for days when the court is open by the judge for business or business is actually transacted in court, and when they attend under sections 583, 584, 671, 672, and 2013 of the Revised Statutes, which fact shall be certified in the approval of their accounts.

The finding of the court below on this item does not show that the facts were so certified. Compliance with that statutory rule can not perhaps be presumed by the approval of the account of the marshal by the local judge under the act of February 22, 1875 (18 Stats. 223; Supp. Rev. Stats., vol. 1, p. 61). But as this court had decided the main question in *United States* v. *Pitman* (147 U. S. 669) under the same provision of the act of March 3, 1887, we did not contest this item in the court below and do not do so now. (*United States* v. *Finnell*, 185 U. S., 236.)

Item 12,—$5,135.50 (R. 4; and Cross Appeal No. 195, R. 2).

This is a charge of fees for transportation of prisoners, deputies, and guards within the marshal's judicial district under warrants or process of arrest, from the places of arrest to the places where the writs were returned. This item was disallowed by the court

below and by the accounting officers under construction of the act of August 18, 1894 (28 Stats., pp. 372–416), which provides as follows:

> That it shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendants before the nearest circuit court commissioner or the nearest judical officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial, and the officer or magistrate issuing the warrant shall attach thereto a certified copy of the complaint, and upon the arrest of the accused, the return of the warrant, with a copy of the complaint attached, shall confer jurisdiction upon such officer as fully as if the complaint had originally been made before him, and no mileage shall be allowed any officer violating the provisions hereof.

Under the fee bill (sec. 829, Rev. Stats.) the marshal was allowed mileage for going only in serving process, warrants, etc., 6 cents a mile, to be computed from the place where the process was returned to the place of service (as stated under Item 2, *supra*), and also for the transportation of criminals, 10 cents per mile for himself, each prisoner, and necessary guard. In such cases the mileage of the marshal for the transportation of prisoners, etc., was to be computed from the place where the process was served to the place where it was returned. The above statute changes the measure of compensation by requiring the marshal, when he arrests a prisoner, to take him

before the nearest circuit court commissioner or the nearest judicial officer having jurisdiction for a hearing, commitment, or taking of bail for trial. Instead of doing this the marshal brought the prisoners before United States commissioners whose offices were nearest the places where the crimes for which they were respectively arrested were committed.

This action of the marshal is attempted to be justified under the provisions of the act entitled "An act to provide a temporary government for the Territory of Oklahoma * * * ," approved May 2, 1890 (26 Stats., 81). Section 10 of that act, which is partly set forth in the brief for the cross-appellant, requires the United States marshal, or his deputies, to bring parties arrested for any offense or crime in the Territory before a United States commissioner or a justice of the peace of the county whose office is nearest to the place where the offense or crime was committed.

It is contended by the learned counsel on the other side that the section of the organic act above cited governs the marshal's duties and fees in serving process of arrest in the Territory on persons charged with offenses or crimes against the United States. Our contention is that it relates only to offenses or crimes against the Territory. Therefore we contend that there is no conflict between the said act of August 18, 1894, and the act of May 2, 1890, above cited. The former act had relation to the duties of marshals in serving process for the arrest of persons charged with criminal offenses against the United States. The act of May 2, 1890,

had reference to offenses and crimes committed against the Territory of Oklahoma, and therefore it did not attempt to change the general law as to the duties of marshals. By the laws passed at the first legislative assembly of the Territory in relation to criminal procedure it was enacted that "A criminal action is prosecuted in the name of the Territory of Oklahoma as a party against the person charged with the offense." (Statutes of Oklahoma 1890, ch. 72 (3507), sec. 17.) The organic act established a temporary government, and, of course, until the county officers provided for in sections 9 and 11 were appointed or elected, there would be no officer to serve process for the Territory except the United States marshal. Therefore, naturally, Congress required the marshal to serve all such process until sheriffs could be appointed or elected and qualified in the various counties of the Territory. In effect the marshal was made for the time being the sheriff for each county in the Territory, and as such acting sheriff he was, of course, required by the organic act to bring prisoners arrested for offenses against the Territory before a United States commissioner or a justice of the peace whose office was nearest to the place where the offense or crime charged against the prisoner was committed. Until justices of the peace were appointed or elected in each county, of course, the United States commissioner had jurisdiction under the organic act. The two acts above cited can not be construed as in conflict with each other, because each act was passed for

a different purpose; hence it is unnecessary to discuss the question of the repeal of the former act by the latter act, or of conflict between their provisions.

Section 13 of said act of May 2, 1890, provides that a marshal shall be appointed for said Territory "who shall execute all process issued from the said courts when exercising their jurisdiction as circuit and district courts of the United States," and that he shall be allowed "the same fees as are prescribed for similar services" rendered by United States marshals in chapter 16, title Judiciary, of the Revised Statutes of the United States. And section 28 extends the Constitution and laws of the United States, not locally inapplicable, except so far as modified by this act, to the Territory of Oklahoma. This, by inference, extends all subsequent applicable acts of Congress to that Territory.

The legislation in this organic act is the fundamental law of the local government; and the relation of the Territory to the General Government is much the same as that which counties bear to their respective States; hence Congress has legislated for the Territory as a State does for a municipal organization, and this kind of legislation includes subjects upon which Congress has not power to legislate for States, as, for example, service of State court process. If others are included, the subjects are easily distinguished. (*National Bank* v. *County of Yankton*, 101 U. S., 129, 133; *Mormon Church* v. *United States*, 136 U. S., 42, 44.)

In the case at bar the marshal made a mistake in

his construction of the organic act of May 2, 1890, instead of complying with the requirements of the general act of August 18, 1894, therefore the court below disallowed this item.

In regard to the point attempted to be made in the brief on the other side, viz, that there has been no "circuit court commissioner" in the district of Oklahoma since the act of May 2, 1890, the answer is that the terms "circuit court commissioner" and "United States commissioner" were at that time synonymous titles for the same office or officer, whose statutory title was "commissioner of the circuit court." For example, in the act of February 22, 1875, above cited, upon which counsel relies for prima facie proof of the various items of the accounts in suit (*United States* v. *Jones*, 134 U. S., 483, 488; and *United States* v. *Harmon*, 147 U. S., 268, 282), commissioners who were appointed by the United States circuit courts under section 627 of the Revised Statutes are called "United States commissioners," and by the act of May 28, 1896, chapter 252 (29 Stats., 184), which abolished the office of "commissioner of the circuit court" (R. S., sec. 627) and created the like office of commissioner of the United States, the laws relating to the former office were made applicable to the latter office.

APPEAL NO. 142.

Item 24,—$90.50 (R. 4).

This item was properly disallowed by the court below. The paragraph of the fee bill above cited (R. S. § 829),

which allows the marshal actual expenses incurred in the transportation of criminals who were convicted in districts where there was no available penitentiary and sent to a prison in another district, does not authorize any fee or reimbursement of expenses where the prisoner is not transported to the designated prison. In this case the prisoner escaped from the custody of the deputy marshal, and there does not appear to be any law authorizing the reimbursement of the marshal's expenses in such cases.

Respectfully submitted.

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IN THE

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OCTOBER TERM, 1902.

No. 142.

THE UNITED STATES, Appellant,

vs.

EVETT D. NIX.

and

No. 195

EVETT D. NIX, Appellant

vs.

THE UNITED STATES.

Appeals from the Court of Claims.

BRIEF FOR EVETT D. NIX.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 142.

THE UNITED STATES, APPELLANT,

vs.

EVETT D. NIX.

Filed July 25, 1901.

No. 195.

EVETT D. NIX, APPELLANT,

vs.

THE UNITED STATES.

Filed November 23, 1901.

CROSS-APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR EVETT D. NIX.

Statement of the Case.

The case is here upon cross-appeals. The United States has appealed from a judgment of $108.95, rendered in behalf of the claimant on items 2 and 16 of Finding 111 (record, p. 5). The claimant appeals from the disallowance by the Court of Claims of all the other items of his

account. The claimant, Evett D. Nix, was United States Marshal for the District of Oklahoma from July 1, 1893, to February 24, 1896, duly appointed and qualified, (Finding 1, p. 3). During said period the claimant as such marshal, by his deputies, performed services and travel, and incurred expenses in behalf of the United States, and his accounts therefore, duly verified by his oath, and approved by the court in accordance with law, were finally acted upon by the accounting officers of the Treasury Department, and part thereof was allowed and paid, and part thereof disallowed. (See Finding No. 11.) Claimant thereupon brought this action April 3, 1897, in the Court of Claims to recover judgment for the items disallowed. After the filing of the petition certain items of the account were conceded by the Government's counsel, and thereupon a motion was made to sever the cause of action and to file two separate petitions, one to cover all items not contested by counsel for the Government, and the other to cover all the contested items. This motion was allowed and thereupon claimant filed two separate petitions with the first of which—that covering the uncontested items—we have nothing to do; to the second, however—that covering the contested items—this appeal refers.

It will be observed that the claimant's petition (Rec. pp. 1, 2) sets forth the *total* of the items claimed by him as $5,434.95. There was allowed by the Court of these items only, $108.95, leaving a total of $5,326 disallowed, which is the amount in controversy on these appeals.

The appeal of the United States goes only to the allowance to the claimant of two items, viz., "Nos. 2 and 16 of Finding 111" (Rec.5) the sum total of which is $108.95. As to the first of these items the claimant contends that the allowance was rightly made. Sec. 829 R.

S. provides a mileage to the marshal "For travel in going only to serve any process, warrant, attachment or other writ * * * six cents a mile to be computed *from the place where the process is returned to the place of service.*" The claimant has charged exactly in accord with the statutory provisions, computing the distance by the unavoidable circuitous routes traveled. The law does not require the distance to be computed "as the crow flies" from point to point. The account has been approved by the District Judge "in accordance with law" as stated by the finding. This approval, as held in the cases below cited, is *prima facie* evidence of its correctness and in the absence of clear and unequivocal proof to the contrary, it should be conclusive.

Jones *vs.* United States, 134 U. S., 483, 488.
United States *vs.* Pointer, 140 U. S., 163.
United States *vs.* Barber, 140 U. S., 179.
United States *vs.* Harmon, 147 U. S., 268.

So with the 16th item, indeed so with all the items of the account, the claimant starts off with the force of this approval by the District Judge as vouching for their *prima facie* correctness; and until therefore, there be, something in the finding to impeach the certificate of the District Judge, the mere disallowance without more cannot be upheld.

This disposes of the defendant's appeal.

The Cross-Appeal.

It remains now to deal with the items of the account disallowed by the Court of Claims, and from which action the claimant has taken a cross appeal.

Assignments of Error.

The appellant in the cross-appeal assigns the following errors of the court below.

1. The said court erred in failing to find, as requested by the claimant (cross-appellant) the number of miles traveled by the claimant, his deputy and prisoners and guards, for which he claims compensation as set forth in item 12 of his third request for findings of fact. If the number of miles traveled was not as stated by appellant, viz. 51,355 miles in his said request the court should have stated in its finding what was the correct number.

2. The said court erred in not allowing ten cents a mile for at least *some* distance traveled, it being evident from said item 12 of the court's third finding of fact that the claimant, his deputy and prisoners and guards traveled *some* distance whatever it was.

3. The said court erred in disallowing item 10 of the third finding of fact.

4. The said court erred in disallowing the 24th item of the third finding of fact.

Let us first deal with the largest item, viz. No. 12 of Finding 111. We are here confronted at the outset with what this court in United States *vs.* Clark, 94 U. S., 73, has termed "an insufficient finding." In the event, therefor, of this court believing this imperfection to be material, the case must be remanded for further proceedings. In the case just above cited, the court, through Mr, Chief Justice Waite said, "Upon the facts set forth in the special finding this judgment cannot be sustained, because of the omission to state the amount of the loss. As in our action upon the appeal we do not look beyond the finding the judgment must be reversed on account of an insufficient finding, and the cause remanded for further proceedings as law and justice may require."

So in Mahan *vs.* the United States, 14 Wall., 109, it was held that "if the Court of Claims refuses to find as prayed, the prayer and refusal must be made part of the record [which we have done in the case at bar]. The remedial purpose of this rule is that when a party has in writing, indicated a specific question of fact on which he desires the Court of Claims to make a finding, and the court has neglected or refused to do so, this court may be able to determine whether the question is one so necessary to the decision of the case that it will send it back for such finding."

Now the claimant at bar in his petition, as well as in his request for findings, sets out this item 12 with the necessary particularity. He gives the total amount of miles traveled as 51,355, and charges at the rate of ten cents a mile, (the admitted rate), thus making his claim $5,135.50. The finding of the Court of Claims, however, notwithstanding the claimant's specific request that the court find the number of miles traveled, fails to say how many miles were traveled, but merely states that on this item the accounting Officers of the Treasury disallowed $1,143.30. If the finding had stated what were the number of miles traveled, then this court, knowing the legal rate of mileage, would know, "as a conclusion of law," just how much the claimant would be entitled to receive. But it does not enlighten the court so as to enable it to say whether the allowance was right or wrong merely by informing it that the amount was "for transportation of prisoners." The court must know what distance these prisoners traveled, and then it will follow as a conclusion of law, what the claimant should have been allowed. Surely, nothing could be more vague and insufficient than the finding in question. Had the court found, as we requested it to find, namely, that the number

of miles traveled were 51,355, then it is plain that we should have been allowed $5,135.50, unless there be something in the finding to sufficiently impeach the effects of the approval of the item by the District Judge. There are two special reasons, therefore, why the number of miles traveled should have been found. First, it would at once without further inquiry, have shown the amount in controversy. Second, it would enable this court to ascertain "as a conclusion of law," the amount due the plaintiff.

The finding, it is true, does show the amount the accounting officers disallowed, but how is this court to know whether this disallowance was right or wrong until it knows, as we have said, the number of miles which the claimant or his deputies and prisoners traveled. The finding states the amount disallowed to have been $1,143.30. For how much travel was this disallowance made? It may have been because we claim pay for 11,433 miles more than 51,345 miles for which latter sum, for all that this finding shows, we may have been allowed. Or again it may have been that we claimed for only 11,433 miles and were not allowed anything upon the claim. It is evident however from this finding that the claimant traveled *some* distance, and that he was allowed *nothing* for that distance whatever it was. When therefore, we ask that the cause be remanded because of the insufficiency of this finding, we surely have not asked for what we are not entitled to.

But let us suppose that the court had found the number of miles traveled to have been as stated in the claimant's request for finding, viz. 51,355, then before the claimant can recover at the rate of ten cents a mile for this distance there still remains the question whether he is entitled to mileage *at all* for transporting the prisoners "from the several places of arrest for a hearing before the United

States Commissioners whose offices were nearest the places where the crimes were committed, instead of bringing the prisoners before the commissioners whose offices were nearest the places of arrest."

The answer to this question involves the determination of an alleged conflict of law. The provisions of the Act of Congress entitled "An Act to provide a temporary Government for the Territory of Oklahoma, approved May 2, 1890, 20 Stats. at Large, 87, Sec. 10, reads as follows: "Persons charged with any offense or crime in the Territory of Oklahoma and for whose arrest a warrant has been issued, may be arrested by the United States marshal or any of his deputies wherever found in such Territory, but in all such cases, the accused shall be taken for preliminary examination before a *United States Commissioner* or a justice of the peace *whose office is nearest to the place where the offense or crime was committed.* By a later act (August 18, 1894) Congress has provided that, "It shall be the duty of the marshal, his deputy, or other officer who may arrest a person charged with any crime or offense to take the defendant before *the nearest Circuit Court Commissioner, or the nearest judicial officer having jurisdiction under existing laws, for a hearing, commitment, or taking bail for trial,* * * * and no mileage shall be allowed any officer violating the provisions hereof." (28 Stats. at Large, p. 416.)

There are not now, nor have there ever been any "Circuit Court Commissioners" in the District of Oklahoma since the Act of May 2, 1890, which specifically designates such United States Officers as "United States Commissioners."

In the case at bar the marshal brought the prisoners, as stated by item 12 of the Third Finding of fact, "from the several places of arrest for a hearing before United

States Commissioners whose offices *were nearest the places where the crimes were committed by the prisoners*, instead of bringing the prisoners before the commissioners whose offices were nearest the places of arrest." In other words, the claimant obeyed the Oklahoma or special statute, instead of the later or general statute. Was he correct in doing so? Let us examine the authorities.

> "The settled rule of statutory construction is that general legislation must give way to special legislation on the same subject, whether the provisions are found in the same statute or in different statutes; and general provisions must be interpreted so as to embrace only cases to which the special cases are applicable."
> Magone, Collector, *vs.* King, 51 Fed. R., 525, 526.

> "It is an established rule, on the construction of statutes, that a subsequent statute, treating a subject in general terms, and not *expressly* contradicting the provisions of a prior act, shall not be considered as intended to affect more particular and positive provisions of the prior act, unless it be absolutely necessary to do so in order to give its words any meaning."
> State *ex rel.* Fosdick *vs.* the Mayor, 14 Ohio St. 420.

> "The rule is that where a general intention is expressed, and the act expresses also a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception."
> Churchill *vs.* Crease, 5 Bingham, 177.

> "Where a general law and a law which applies only to a limited district come in conflict, the general law yields to the special, and this without regard to its being posterior in date, for a general

regulation of any subject-matter, as the assessment of taxes, or laying out of roads, will not change or repeal by implication the power before conferred on particular municipalities; such repeal must be made by express words. So held in a case where the charter of a city conferred on the municipal government the right to lay out streets and highways in a manner *different* from the mode prescribed by the *general* law of the State, the State law being held suspended within the limits of the city."

The State *vs.* Clark, 25 N. J. Law, 54.
See also State *vs.* Trenton, 38 N. J. Law, 64 to same effect.

"The well settled rule of construction, where contrary laws come in question is that the law general must yield to the the law special." Noy's Maxims.

It was upon these principles that the court in Townsend *vs.* Little, 109 U. S., 504, held that, "specific and general statutory provisions may subsist together, the former qualifying the latter." In that case a Territorial Act, under which a deed of real estate was made to A by the mayor, directed that "Deeds of Conveyance of the same shall be executed by the mayor of the city or town, under seal of the corporation." A general Act of the Territory at the time the deed was made, required deeds to be *witnessed*. The deed to A bore the corporate seal, as required by the special Act, but was not witnessed. Held, that the special Act controlled the general Act, and that the deed was good.

Townsend *vs.* Little, 109 U. S., 504, citing among others London, etc., Railway *vs.* Wardsworth Board of Works, Law Rep., 8 C. P., 185.
Bishop on the Written Laws, Sec. 112a.

We submit, therefore, under the authority of the foregoing citations, that when a Federal statute declares that, "Persons charged with any offense or crime *in the Territory of Oklahoma*, for whose arrest a warrant has been issued," etc., shall be carried by the United States Marshall to a certain place, these directions must be obeyed, by the U. S. Marshal for Oklahoma instead of the different directions of a general statute in which Oklahoma is not specifically named. In other words, the provisions of the statute applying specifically to Oklahoma must be regarded as an exception to the general statute. See also the opinion (unreported) of Judge McAtee, District Judge of the Fifth Judicial Circuit of Oklahoma, where it was held that not only must the warrant of arrest issue by, but the prisoner must be broughtto the U. S. Commissioner nearest the place where the crime or offence was committed. The opinion will be found in the appendix to this brief

If we are right in this contention, then it is perfectly apparent that the accounting officers of the Treasury Department were in error in disallowing the claim of the claimant upon this item ; and just at this point we may begin to see even yet clearer how the claimant is hampered by the failure of the Court of Claims to find the number of miles traveled by the claimant in executing his writs of arrest. Had that been done this Court could at once see the exact amount to which the claimant is entitled, without resorting to the petition. We submit, therefore, that upon this item the Court should either remand the cause with directions to ascertain the number of miles traveled and to allow the statutory rate of ten cents per mile, or, else, adopt the undisputed and indisputable fact that the account of the claimant was approved by the Court for 55,134 miles of travel, which fact, as we have shown, is *prima facia* evidence

of the distance traveled when there is nothing in the record to show to the contrary, and then remand the case with directions to allow this item as claimed by the claimant.

There remains to be considered two other items of the third finding, which were dissallowed, viz. items 10 and 24.

Item 10, $100.

This item was "for attendance of the marshal at court by deputy for twenty days at $5 per day, $100." It was found by the Court of Claims that "the court was opened for business [on the days charged for] by order of the judge;" and the item seems to have been disallowed, because "it does not appear whether business was transacted on said days" and also because "it does not appear that the judge was present at court on any of those days." It is respectfully submitted that since the approval of the account "according to law" by the judge of the Oklahoma Court was *prima facie* evidence of all the facts necessary to be shown in order to obtain that approval it is not incumbent on the claimant to make it "appear" before the accounting officers of the Treasury, or the Court of Claims, that either the judge was present, or business was transacted on the days for which the account was approved; if it be material and permissible to show the contrary, that duty is on the defendant; the claimant has done all he is required to do when he shows that his accounts were "approved according to law" by the District Judge. Claimant stands upon that approval as *prima facie* evidence of its correctness, and is not required to make it appear (otherwise than by the approval itself) that those things existed without which the approval could not have been made "according to law."

Jones v. United States, 134 U. S., 483,488.
United States v. Barbour, 140 U. S., 179.
United States v. Harmon, 147 U. S., 282.

Item 24, $90.50.

This was an actual expense account paid by the claimant to his deputy, covering railroad fare, etc,, of the deputy, prisoner and guard, as declarded by the finding itself, " for transporting a prisoner from Springfield, Ohio, to the penitentiary at Brooklyn. New York, under a warrant of commitment. The warrant of commitment was was issued at Oklahoma, and the marshal transported the prisoner on that warrant to Springfield, Ohio, where the prisoner was temporarily detained as a witness for the United States in a counterfeiting case. The prisoner having been discharged, as a witness in that case at Springfield, the marshal continued his transportation from Springfield to New York City on the original warrant of commitment. The prisoner, with a deputy and guard, arrived in New York City too late for the prisoner to be received at the Brooklyn penitentiary on the day of arrival in New York, and he escaped from the custody of the deputy on the night of the same day while they were going to supper in the hotel where they were stopping. *The marshal made every effort to retake the prisoner and failed.*"

We submit that the same rule with respect to the prima facies of an account, when approved by the District Judge, which was applied in Jones vs. the United States, *supra*, and the cases there cited, (see supra item 10) applied to this claim. The expense account was apparently disallowed because the prisoner escaped. No law can be found where such a penalty is applied to an officer under the circumstances set forth. If the marshal

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is liable on his bond for being derelict or carelesss in the performance of his duties (a fact which the finding negatives) there is a proper course to pursue under the law, but there is no provision which allows the accounting officers to arbitrarily disallow the expenses actually and necessarily incurred and paid.

This concludes the brief upon the correctness of the items of the claimants claims.

Jurisdiction.

It may be intimated, however. that this court is without jurisdiction to consider any of the items except those embodied in the appeal of the United States. If this position be taken we desire to present the following considerations, upon this question.

1st. The principal appeal and the cross-appeal are to be taken as one appeal. It, of course, cannot be disputed, that the court has jurisdiction of the government's appeal, since there is no limit placed by the law upon the *amount* involved when an appeal is taken by it from the Court of Claims. Having, then, jurisdiction of that appeal, it has also jurisdiction of the cross-appeal. This has been held by this court in the case just below cited to wit:

> "Where the appeal is from a decree sufficient in amount to give the Court jurisdiction [and the Government's appeal is sufficient in amount to give jurisdiction] a cross-appeal will not be dismissed, although it is from a decree awarding against the defendant below less than that amount, as the appeal *opened the whole controversy in this Court.*"
>
> Walsh *vs.* Mayer, 111 U. S., 31.

In that case the Court by Mr. Justice Matthews said:

> "We have disposed of the case upon both ap-

peals. The motion to dismiss the cross-appeal of the defendant below, for want of jurisdiction on the ground that the amount in controversy is less than $5,000, is overruled. The cross-appeal, it is true, is from a decree awarding against defendants below less than that amount, and it could not, therefore, be maintained by itself; but the appeal of the plaintiffs below, to which it is incident, *opened the whole controversy here*, so far as they were concerned, and that of the defendant must be allowed to have the like effect as to them, so that upon both appeals the case was brought up *as it stood for hearing in the court below*, the claims of the respective parties involving the question of liability as to the whole amount."

It will be observed that the claimant brought his action in the Court of claims to recover $5,434.95, *as set forth in his petition.* He has been disallowed by the Court below the whole of this sum excepting $108.95. Is not then the amount in controversy over $3,000? Is it not, in fact, over $5,000?

"This court has jurisdiction of a writ of error, or an appeal by the plaintiff below when he *sues for* as much as or more than our jurisdiction requires and recovers nothing, or recovers only a sum which, being deducted from the amount or value sued for, leaves a sum equal to or more than our jurisdictional limit for which he failed to get a judgment or degree.

Hilton *vs.* Dickinson, 108 U. S., 165.
Scott *vs.* Lunt, 6 Pet. 349.
Knapp *vs.* Banks, 2 How. 73.
Walker *vs.* U. S., 4 Wall. 163.
Rodd *vs.* Heartt, 17 Wall, 354.
Dows *vs.* Johnson, 110 U. S., 223.

An *allegation in the declaration* of damages generally fixes the amount of value for the purpose of jurisdiction.

Ryan *vs.* Bindley, 1 Wall. 66.

So in a suit for property *plaintiff's averment* of value determines the amount in controversy.

Bennett *vs.* Butterworth, 8 How. 124.

Again, the jurisdiction of this court attached to this case when the Government appealed. On that appeal, where a cross-appeal is taken, the *whole case is opened*, as was said in Walsh *vs.* Mayer, *supra*. The Jurisdiction, therefore, having once attached, cannot be taken away by a change in the value of the subject of controversy.

Cook *vs.* U. S., 2 Wall. 218.

An analogous case is that of Ellis *vs.* Harrison, 104 Mo., 280, where the Supreme Court of that State has jurisdiction when the amount in controversy exceeds $2,500. In the case referred to it was held that "In a case where one judgment embodies a finding against plaintiff as to three counts of the petition involving more than $2,500 and against the defendant as to the fourth count involving less than that sum, *both parties appealing*, the Supreme Court has jurisdiction to determine both appeals under the constitution of Missouri. Art. 6, Sec. 12, citing U. S. *vs.* Mosby, 133 U. S., 273.

If, on the other hand, the court be of opinion that the case at bar has not been brought within the application of the foregoing authorities, because the findings of fact fails to show with certainty the amount in controversy owing to the insufficiency of Finding 111, Item 12, then we ask the remanding of the cause for the reasons and upon the principle stated when that question was being discussed by this brief, *ante* pages 4–5.

Respectfully submitted,

FRANK B. CROSTHWAITE.

FRANKLIN H. MACKEY,
Of Counsel.

For Cross-appellant.

APPENDIX.

IN THE DISTRICT COURT FOR GRANT COUNTY, FIFTH JUDICIAL DISTRICT OF OKLAHOMA.

UNITED STATES OF AMERICA *Plaintiff*,
vs.
JOSEPH GAUTIER, *Defendant*.

Opinion of Judge McAtee.*

This is a criminal proceeding begun in Logan County, in the First Judicial District of this Territory, and brought to secure the punishment of the defendant for an offense against the laws of the United States, which is charged to have been committed in Grant County, in the Fifth Judicial District of this Territory.

An affidavit was made upon the 6th day of June, 1895, by one Edward Taylor, before one J. T. Saunderson, a Commissioner of the District Court of the United States for the First Judicial District of Oklahoma, in which it was charged by the affiant that on the 24th day of May, 1895, in Grant County, Oklahoma, in violation of section 5388 of the Revised Statutes of the United States, the defendant "did unlawlully, willfully and feloniously cut, remove, destroy and dispose of standing and growing timber upon government land," contrary to the said statutes.

Thereupon the said commissioner in Logan County, of the First Judicial District of this Territory, issued his warrant to the Marshal of the United States, and to his deputies or either of them, in which it was recited that the said Taylor had made his "complaint in writing under oath before him, the said Commissioner of the District Court for the First Judicial District of Oklahoma, charging" that the said defendant committed the offense above specified.

*This opinion is not cited in the brief, because it is unreported, but a certified copy of it is filed with the papers and we therefore print it as an appendix. It will be seen that the United States Marshal in the case at bar followed the ruling made by the learned judge delivering the opinion in this case and took his prisoners to the U. S. Commissioner nearest the place where the crimes or offenses were committed.

Thereupon and by ths said warrant the said commissioner undertook to command the said marshal and his deputies in the name of the President of the United Statee, to "apprehend the said Joseph Gautier and bring him forthwith before me or any other commissioner having jurisdiction of said matter to answer to the said complaint that he may then and there be dealt with according to law, for said offense."

Thereupon by virtue of said paper, purporting to be a lawful warrant, on the 13th day of June, the United States Marshal, arrested the said Joseph Gautier in Grant County, and brought him before a United States Commissioner for the Fifth Judicial District at Pond Creek. in Grant County, upon said criminal charge; whereupon the defendant was held to appear before the District Court of the United States for the Fifth Judicial District to be held in Grant County at the next regular term of said court, but was admitted to bail.

Afterward a formal complaint; based upon these proceedings was filed against the defendant in open court September 10th 1895.

The case comes on to be heard upon the motion made by the defendant's attorney, A. M. Mackey, Esq., to quash the information: (1) because the proceeding is void, and (2) because it is not instituted according to law.

The question is one of the greatest practical importance in this Territory. It has been the common practice of the United States commissioners of the Fifth Judicial District to receive affidavits of the character mentioned in this case, and to issue warrants thereupon for the arrest of persons upon similar charges to many counties in the western portion of the Territory. If the practice is justified by the law, it permits the institution of criminal proceedings, of proceedings for the punishment of offenses

against the laws of the United States in counties other than that in which the offense was committed. A defendant then may be arrested in Woods County upon an accusation made before a United States commissioner in Logan County, more than 150 miles from the place where the offense is charged to have been committed, or in Roger Mills County, more than 200 miles from the place where the accusation is made, and from where the order of arrest was issued.

It is provided by Section 10 of the Organic Act of this Territory, page 44 of .he Statutes of 1893, that:

> "All offenses committed in said Terriority, if committed within any organized county, shall be proseuted and tried within said county."

The trial is a part of the prosecution, and no officer exercising judicial functions, would undertake to conduct the trial of the accused person outside of the county within which the offense is charged to have been committed.

Neither can the affidavit or information for the purpose of procuring a warrant to issue, which is made by the complaing witness, be made and the warrant issued thereupon by the commissioner. directing the arrest of the person who is charged with the offense, he issued outside of the county where the offense is alleged to have been committed, unless it is held that these measures are themselves no part of the prosecution.

This contention cannot be sustained. The prosecution includes every step by which, in pursuance of the method described by law, an individual is sought to be separated from the mass of his fellew citizens, and made the subject of a charge for a criminal offense for the purpose of ascertaining the truth of the charge, and securing the punishment of the accused.

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The very initial step of swearing out the warrant, including both the affidavit made by the accuser and the judicial step of ordering the arrest of the accused by the United States Commistioner, are a part of the prosecution.

It is impossible to hold otherwise. The defendant is held in this court upon an accusation made in the name of the United States of America, upon an information for cutting government timber in violation of the federal statute. That information is based upon the fact that the defendant was held by the United States Commissioner for Grant County to "personally appear before the District Court of the United States * * * then and there to answer the charge of committing the offense of cutting, removing, destroying and disposing of standing and growing timber upon government land." That holding of the the United States Commissioner for Grant County was based upon the affidavit of Edward Taylor made before the "Commissioner of the District Court for the First Judicial District of Oklahoma," in Logan County. Without the affidavit of Taylor and the warrant issued by the UnitedStates Commissioner for the First District of Oklahoma, this arrest would not have been made and the prosecution not have been begun.

His affidavit, which is the information laid for the purpose of causing the issuance of the warrant, is therefore up to this point, the most important step in this proceeding, and is an integral part of the prosecution.

Prosecution is defined in Webster's dictionary to be :

> "The institution of commencement and continuance of a criminal suit ; the process of exhibiting formal charges against an offender before a legal tribunal, and pursuing them to final judgment on behalf of the state or government, as by indictment or information."

It is the "act of conducting any judicial proceeding and also the proceeding itself," and it includes everything done or performed by any court or judicial officer touching the rights of parties.

Anderson's Law Dictionary.

Flournoy *vs.* Jeffersonville, 17 Ind., 173.

And it was held by this court in the case of the United States *vs.* Duncan and others, in which the defendants were arrested in Grant and Garfield counties and brought before the court at Kingfisher, in Kingfisher county, in July of 1894, that:

> "It is therefore clear that if I act as a committing magistrate, I must go into the county where the alleged offenses were committed, and there sit to have the hearing of these cases, for the very institution of the suit—the making of the complaint, the issuance of the warrant of arrest of the defendants and their appearance for preliminary examination, are in fact a part of the prosecution.
>
> "It is held otherwise in behalf of the plaintiff here, and it is contended that 'prosecution' begins only with the actual trial. But I do not doubt that the very first step taken to abridge the liberty of any individual by legal proceedings against him to secure his punishment under the law for a crime, is a part of the 'prosecution.' The authorities which I have been able to find upon this subject state that 'prosecution' is the 'means adopted to bring the supposed offender to justice and punishment by due course of the law. In this country the means are by indictment, by presentment, by information and by complaint."
>
> Bouv. Law Dict., vol. 2, p. 389.
>
> State *vs.* Williams, 34 La., An. 1198.

> "The mode of prosecution is by indictment, presentment by grand jury, by coroner's inquest and by information."
>
> 1 Chitty's Crim. Law, pp. 132–134.
>
> "A prosecution is the institution or commencement of a criminal suit; the process of exhibiting formal charges against an offender before a legal tribunal, and pursuing him to final judgment on behalf of the state or government, as by indictment or information."
>
> Burrell's L. Dict.
> Schulte *vs.* Keokuk Co., 37 N. W. Rep.

There is reason why the law is as it is. The weight of a criminal prosecution in which the government appears, accusing a citizen for the commission of a criminal offense, should not be borne among strangers, but among those who surround the locality of the crime which is sought to be punished, and who may know something of the offender whom the government seeks to bring to justice. The defendant has a right to demand that he should sustain the weight of a criminal accusation only in his own neighborhood *or where the offense was committed*, and among those who know him, and where all the human motives of personal and neighborhood interest are in full force, both in order to protect those whom the alleged violation of the law has injured, as well as for the protection of the supposed offender. There are United States commissioners, as well as a United States Court, within Grant County, and while the trial for the offense committed in Grant County must be held in the District Court of Grant County, so also the prosecution must begin and be carried on before the United States commissioner of Grant County, up to the time of the filing of the complaint and the trial of the cause in the

District Court, and for the same reasons. And, doubtless, the provision of the Organic Act is founded upon the right of the defendant as founded in natural reason and justice.

There is no reason why these informations for arrest should be taken out of the Fifth Judicial District, where the information of the offense exists, if it in fact exists at all, and into the First Judicial District, and from Grant County into Logan County, and away from the jurisdiction of the United States commissioner, of Grant County, who has the lawful jurisdiction, to the United States commissioner of Logan County, who has no jurisdiction in the matter, except with the object of procuring warrants to be issued with a readier facility by causing affidavits to be made before a United States commissioner, who has neither residence, knowledge, personal interest or jurisdiction in the county to take any step in the prosecution outside of the county where the offence is charged to have been committed.

The case now before the court is but one of a very large number of similar cases in which the United States commissioners of Logan County, in the First Judicial District, have for a long time persistently grasped jurisdiction which does not exist in them, to hear affidavits and informations for arrest; and in which they have issued warrants for the arrest of persons to many of the counties in this Territory, among whose people they could not reside, for the preservation of whose interests and for the control of whose actions they have not been appointed, in whom they can have but little interest, with whom they have no sympathy, to whom they are in no sense answerable, for whose welfare they manifest no concern, and over whom the law gives to them no lawful authority.

The motion to quash the information is sustained, for

the reason that it is based upon an affidavit and information for the issuance of a warrant which are void and without authority, and not capable of sustaining the subsequent steps in this prosecution.

TERRITORY OF OKLAHOMA, } ss.
Garfield County. }

I, C. F. McElrath, Clerk, District Court, in and for the County and Territory aforesaid, do hereby certify that the above and foregoing is a true copy of the decision of the court in the above entitled cause.

Witness my hand and the seal of said court, hereto affixed at my office in Enid, this 22d day of November, 1902.

C. F. MCELRATH,
Clerk District Court.

By PEARLE BEAUCHAMP,
Deputy.

[SEAL.]